



CERCLA 106(B) PETITION
NO. 96-3

PETITIONER

I. BACKGROUND AND PROCEDURAL HISTORY

Tiger Shipyard, Inc. (Tiger) operates a barge cleaning and repair facility on the Mississippi River just north of Port Allen, Louisiana. Based in part on statements allegedly made by former Tiger employees that drums containing rust and scale from the barge cleaning operations were dumped into the river, the United States Environmental Protection Agency, Region 6 (EPA) issued a unilateral administrative order (UAO) to Tiger on March 15, 1995, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). The UAO directed Tiger to locate and remove the suspected drums. Tiger complied with the order, removing 35 drums from the river bottom.

On April 9, 1996, Tiger timely filed a petition under Section 106(b)(2)(A) of CERCLA, 42 U.S.C. § 9606(b)(2)(A), for reimbursement of \$1,402,180.65, the costs it contends it incurred in complying with the UAO. Tiger argues that it is not a liable party of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and that Region 6 arbitrarily and capriciously selected the response action. On April 25, 1997, Region 6 responded to the petition

for reimbursement. After numerous filings by the Parties, the Environmental Appeals Board (Board) determined that an evidentiary hearing on the issue of Tiger's liability was necessary.¹

Pursuant to the Order of the Board dated April 20, 1998, the undersigned was appointed as the Presiding Officer in this case. The Presiding Officer was charged with conducting an evidentiary hearing and providing recommended findings to the Board on the following issues, namely, whether:

1. Tiger Shipyard, Inc. (Tiger) is liable within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2), as an operator of a facility at which hazardous substances were disposed of;
2. Tiger is liable within the meaning of Section 107(a)(3) of CERCLA, 42 U.S.C. § 9607(a)(3), as a person who by contract, agreement or otherwise arranged for disposal of hazardous substances; and
3. Tiger is liable within the meaning of Section 107(a)(4) of CERCLA, 42 U.S.C. § 9607(a)(4), as a person who accepted any hazardous substances for transport to disposal facilities.

If the Presiding Officer determines that the answer to issues 1, 2, or 3 is yes, the Presiding Officer shall make recommended findings on the following two additional issues, namely, whether:

1. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), which protects otherwise liable parties from the acts or omissions of third parties; and

¹The foregoing summary was taken from the Order Granting, in Part, Request for Evidentiary Hearing and Denying Motions to Strike at 1 - 2 (EAB April 2, 1998).

2. Tiger has a defense to liability under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), by virtue of the "innocent landowner" defense raised by Tiger.

Order Scheduling Evidentiary Hearing at 1 - 2 (EAB April 20, 1998).

Furthermore, the Order provides that:

In conducting the prehearing proceedings and the evidentiary hearing, the Presiding Officer is authorized to make any necessary decisions including decisions regarding the admission of evidence. In so doing, the Presiding Officer shall look for guidance to the Consolidated Rules of Practice set forth at 40 C.F.R. Part 22 (recognizing, of course, that under the present circumstances the burden of establishing that reimbursement is appropriate is on Tiger).

Id. at 2.

On April 20, 1999, EPA filed a Motion for Issuance of Subpoenas to Compel the Appearance of Witnesses at 106(b) Evidentiary Hearing. For the reasons set forth below, EPA's Motion is denied.

II. DISCUSSION

EPA has requested that pursuant to 40 C.F.R. § 22.04(c)(9), the Presiding Officer issue subpoenas to compel the appearance of four EPA witnesses: Troy Courville, Tommy Firman, Eric Minor, and Otto J. Zuelke, III. 40 C.F.R. § 22.04(c)(9) provides that the Presiding Officer has the "authority to issue subpoenas authorized by the Act." "Act" is defined as "the particular statute authorizing the institution of the proceeding at issue." 40 C.F.R. § 22.03(a). This proceeding is authorized by CERCLA. Therefore, if CERCLA authorizes the issuance of subpoenas for this proceeding, then the Presiding Officer has the authority to

issue subpoenas. However, EPA failed to cite, nor has the Presiding Officer been able to find, any authority authorizing the issuance of subpoenas in this instance.

Sections 109(a)(5) and (b) of CERCLA, 42 U.S.C. §§ 9609(a)(5) and (b) only authorize the issuance of subpoenas in relationship to administrative civil penalty proceedings. There is also no mention of subpoena authority in Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607. EPA Delegation No. 14-27, which delegates to the Board the authority to rule on reimbursement petitions, is silent on this issue. Therefore, there is no authority for the Presiding Officer to issue subpoenas for an evidentiary hearing held pursuant to Section 106(b) of CERCLA, 42 U.S.C. § 9606(b). *See In the Matter of Tifa Limited*, I.F.& R. Docket No. II-547-C (October 19, 1998) (because there is no authority under FIFRA for an ALJ to issue a subpoena, respondent's motion for subpoena is denied). Thus, EPA's Motion for Subpoenas is denied. If EPA is able to bring to the Presiding Officer's attention any other provision of CERCLA which would authorize the issuance of subpoenas in this instance, the Presiding Officer will reconsider its decision.

Dated this 21st day of April, 1999.

/S/

Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of April, 1999, I served true and correct copies of the foregoing Order Denying EPA's Motion for Subpoenas on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Clerk of the Environmental Appeals Board (1103B)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____
AND VIA FAX (504) 582-8583**

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Regional Hearing Clerk